IKATAN INNOVASI SDN BHD

v.

KACC CONSTRUCTION SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
ABDUL AZIZ RAHIM J
[ORIGINATING SUMMONS NO: 24-317-2007-II]
28 NOVEMBER 2007

CIVIL PROCEDURE: *Injunction - Mareva injunction - Application for injunction restraining defendant from removing its assets pending disposal of arbitration proceedings - Principles applicable - Serious risk of dissipation - Lack of probity - Whether grant of injunction would be oppressive to defendant*

This was an application by the plaintiff for a Mareva injunction restraining the defendant from removing its assets from the jurisdiction of the court up to the amount stated in *ex parte* summons in chambers dated 17 September 2007. One Javel Engineering Sdn Bhd ('main contractor') was awarded a building project, and the defendant was appointed as the sub-contractor to the main contractor for the project. The plaintiff, appointed as the defendant's sub-contractor to carry out the building works portion of the project, duly performed its contractual obligation under the agreement. The main contractor then terminated its contract with the defendant, and the plaintiff's contracts with the defendant and the other sub-contractors were deemed automatically terminated. The plaintiff consequently issued a notice of arbitration pursuant to an arbitration clause in the agreement; the arbitration proceedings were in its initial stages whereby the parties were in the process of nominating an arbitrator. The plaintiff, after discovering that the defendant was actually still involved in the project as the sub-contractor to the main contractor, commenced a writ action against the main contractor and the defendant for tort of conspiracy and unlawful interference with the plaintiff's contract. It was the plaintiff's contention that the defendant's conduct in conspiring with the main contractor to orchestrate a fictitious termination demonstrated a lack of probity the defendant's part. The plaintiff, therefore, believed that there was a serious risk that the defendant would dissipate its assets and, hence, the present application for a Mareva injunction. In the application, the plaintiff prayed for security of the amount of

A RM2,404,364.24 claimed by the plaintiff in the arbitration proceedings against the defendant. In consequence thereof, the plaintiff also prayed for an order to restrain the defendant from dissipating its assets out the court's jurisdiction until the determination and disposal of the arbitration proceedings.

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Held (dismissing the application):

(1) In the instant case, it would appear that the lack of probity on the part of the defendant in relation to the termination of the main contract with the main contractor and the subsequent termination of the sub-contractors' contracts by the defendant had strong vibes. This was because it was evident that although the main contractor had told the defendant and all the sub-contractors under the defendant to clear the project site by a certain date, the defendant and another sub-contractor remained on the project site to complete the works left behind by the plaintiff following the termination, purportedly at the request of the main contractor. However, lack of probity, although a strong factor to be considered as to whether or not to grant a Mareva injunction, must be seen in the light of the other circumstances of the case. It is not an absolute factor or decider as to the grant of a Mareva injunction. The equation in this case - that because the defendant and the main contractor purportedly were not honest in their contractual relationship with regard to the plaintiff, the defendant would also likely not be reliable in the plaintiff's expectation to meet the judgment which the plaintiff was likely to obtain in the arbitration proceedings - simply did not square. The defendant had amply demonstrated that it had not taken any steps to put its assets out of the plaintiff's reach. In fact, the defendant had been frank in disclosing all its assets within jurisdiction in its affidavit. It was true that the plaintiff had shown that the defendant was not exactly a good paymaster. There was evidence in the affidavits, which the defendant did not deny, that the defendant had been slow in making payments to the plaintiff for works already done and billed to the defendant. This fact, however, was insufficient to grant the plaintiff the Mareva injunction on the reasoning that if the plaintiff was successful in the arbitration proceedings in the arbitration proceedings, the plaintiff would also be hard-pressed to realize the judgment in

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the same manner as it was difficult to get payment from the defendant under the contract. If that were the reasoning to be followed, then the granting of the Mareva injunction would merely put the plaintiff in the position of a secured creditor, something which is not supposed to be done in a Mareva injunction. Furthermore, the defendant was a company with an ongoing business. Although there was a winding-up petition being filed against it, the outcome of that petition was yet to be decided. Looking at the defendant's assets as disclosed to this court, the defendant should not be hindered in its effort to resolve the threat of being wound-up by the granting of the Mareva injunction. The grant of such an injunction would be oppressive to the defendant. (paras 42, 43, 44 & 45)

Case(s) referred to:

Amixco Asia Pte Ltd v. Bank Negara Indonesia [1992] 1 SLR 703 ***(refd)***

Ang Chee Huat v. Thomas Joseph Engelbach [1995] 2 CLJ 893 CA ***(refd)***

European Grain & Shipping Ltd v. Compania Naviera Euro Asia SA & Ors [1989] 1 LNS 157 HC (Singapore) ***(refd)***

Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors [1997] 5 CLJ 307 HC ***(refd)***

Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd [2002] 4 CLJ 401 FC ***(refd)***

Pacific Centre Sdn Bhd v. United Engineers (M) Bhd [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 HC ***(refd)***

Petowa Jaya Sdn Bhd v. Binaan Nasional Sdn Bhd [1987] 1 LNS 57 HC ***(refd)***

S & F International Ltd v. Trans-Con Engineering Sdn Bhd [1985] 2 CLJ 228; [1985] CLJ (Rep) 280 FC ***(refd)***

Tsoi Ping Kwan v. Loh Lai Ngoh & Anor [1997] 3 CLJ 552 CA ***(refd)***

Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 LNS 34 FC ***(refd)***

Legislation referred to:

Arbitration Act 2005, s. 11(1)(f), (g)

For the plaintiff - Allan Lao (Lidwina Kiew with him); M/s David Allan Sagah & Teng

For the defendant - Wendel Crocker; M/s Mutang & Sam

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Rahim J:

[1] This is the plaintiff's application for Mareva injunction to restrain the defendant from removing its assets from the jurisdiction of the court up to the amount stated in the *ex parte* summons in chambers dated 17 September 2007. Earlier, on the application by the plaintiff, the court has ordered *ex parte* ad interim injunction against the defendant on 23 October 2007. Today is for *inter partes* hearing of the plaintiff's application and for the court to decide whether or not the *ex parte* ad interim injunction should stay or otherwise.

Background Facts

[2] Javel Engineering Sdn Bhd ("the main contractor") was awarded a contract to design, construct, complete and maintenance of the 3 Bay Bomba Station and staff quarters at Sibu, Sarawak under Contract No. JBPM/T/12/2000 ("project") including the building works. The defendant was appointed as the subcontractor to the main contractor for the project. The defendant then appointed the plaintiff as its subcontractor to the project to carry out the building works portion of the entire of the project by a letter of award dated 11 January 2003; and this was later followed by an agreement dated 1 October 2003. Under the agreement, the original completion date for the plaintiff's works was 12 February 2004. The plaintiff duly and properly performed its contractual obligation under the agreement.

[3] On 25 February 2005 the main contractor issued a notice of termination to the defendant to terminate the defendant's employment as subcontractor to the project and to terminate contract with the defendant.

[4] On 21 March 2005 the defendant informed the plaintiff that the main contractor had terminated the defendant's employment and the contract and hence the defendant would have to cease all operations and vacated the project site as well. Accordingly the plaintiff was asked by the defendant to automatically cease all operations and vacate the site. The plaintiff's appointment as defendant's subcontractor for the project was thus deemed automatically terminated.

[5] It is not disputed that on or before 21 March 2005 that is before the termination, there were already disputes and differences between the plaintiff and the defendant in relation to delay or failure to pay certified progress payments, non-valuation of works carried out by the plaintiff, and disagreement on variation works and non-evaluation of loss and expenses claims for extended period of the plaintiff's works.

[6] The plaintiff consequently issued a notice of arbitration dated 5 September 2007 to refer the disputes to arbitration pursuant to an arbitration clause under the agreement. In the arbitration proceedings, the plaintiff is claiming a sum of RM2,404,364.24 with a reservation of its right on the issue of the plaintiff's termination. The liquidated claim by the plaintiff before the arbitrator consist of the following sums:

(a) RM820,169.63 for the balance of the outstanding sums due and owing for the plaintiff works done by the plaintiff arising from interim certificates of payment and the joint measurement of works carried out on 29 March 2007;

(b) RM60,427.30 for the bakau piling variation works completed by the plaintiff;

(c) RM1,523,767.30 for the plaintiff's loss and expense incurred during the extended period of the plaintiff's works from 13 February 2004 till 22 March 2005.

[7] The arbitration proceedings are currently at its initial stages whereby the parties are in the process of nominating an arbitrator.

[8] After the termination however, on or around 10 and 11 August 2007 the plaintiff discovered that the defendant was actually still involved in the project as the subcontractor to the main contractor, Javel Engineering Sdn Bhd; even though, as it has been shown earlier, that the contract between the main contractor and the defendant had been terminated. This discovery was quite accidental. The discovery was by way of a discovery of a winding up petition filed by one Goodwood Transportation Enterprise. From the petition it was discovered that Goodwood Transportation Enterprise continued to deal with the defendant on matters pertaining to the Infra Works for the project and that the defendant had written a testimonial on Goodwood Transportation Enterprise's performance and ability in relation to Goodwood Transportation Enterprise's performance of the plaintiff's remaining

works after the termination. This goes to show that even after the termination of the contract between the main contractor and the defendant, the defendant continued to do works for the main contractor.

[9] In the circumstance, the plaintiff commenced a writ action against the main contractor, Javel Engineering Sdn Bhd, and the defendant in Suit No. 22-159-2007-III for tort of conspiracy and unlawful interference with the plaintiff's contract on 14 September 2007.

[10] Therefore, it is the plaintiff's contention that the defendant's conduct in conspiring with the main contractor, Javel Engineering Sdn Bhd to orchestrate a fictitious termination demonstrates a lack of probity on the part of the defendant. The plaintiff therefore believes that there is a serious risk that the defendant would dissipate its assets and hence this application for this Mareva injunction.

[11] In the application, the plaintiff prays for security of the amount of RM2,404.364.24 claimed by the plaintiff in the arbitration proceedings against the defendant; and in consequence thereof the plaintiff also prays for an order to restrain the defendant from dissipating its assets out of court jurisdiction until the determination and the disposal of the arbitration proceedings.

The law

[12] Section 11(1)(f) and (g) of the Arbitration Act 2005 provides as follows:

> A party may, before or during arbitral proceedings, apply to a High Court for any interim measures and the High Court may make the following orders for :
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> (a) …
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> (b) …
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> (c) …
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> (d) …
>
> (e) …
>
> (f) the preservation … of any property which is the subject matter of the dispute;

(g) ensuring that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by a party… .

[13] As for the requirements for a Mareva injunction, the law requires the plaintiff (a) to show a good arguable case; (b) to produce evidence that the defendant has assets within the jurisdiction, and (c) to show that there is risk of the defendant's assets being removed from the court jurisdiction. These requirements have been stated in *S & F International Ltd v. Trans-Con Engineering Sdn Bhd* [1985] 2 CLJ 228; [1985] CLJ (Rep) 280. The standard of arguable case here does not mean that the judge must believe the plaintiff's case or that the plaintiff's case has more than fifty percent chance of success at the trial. What it meant is that the materials produced for the judge's consideration whether or not to grant Mareva injunction are sufficient for the court to look seriously into the allegation by the plaintiff or the applicant.

[14] Reading s. 11(1)(f) and (g) of the Arbitration Act 2005 quoted above, there is no doubt that the High Court has the power to grant interim relief or measures to a party partaking in an arbitration proceedings before or during the proceedings. However para. (f) of the section seems to be restricted to preservation of the property which is the subject matter of the dispute before the arbitration proceedings. In this respect, the plaintiff's disputes with the defendant which the plaintiff is referring to the arbitration in this case do not involve any property. The disputes are only related to liquidated sum in the form of payment for works done under a contract. Thus para. (f) of s. 11(1) of the Arbitration Act may not be applicable in this instant.

[15] But para. (g) of the same section of the Act, in my opinion, is wider in scope. The language of that paragraph suggests that the High Court may make such order as the court thinks just and appropriate in the circumstances in order to ensure the award that the applicant or plaintiff may obtain in the arbitration proceedings is not just a hollow piece of paper and of no value, because there is no assets that can be realized from the defendant in order to satisfy the award. The paragraph also does not confine the order that can be made to either movable or immovable assets. Thus, both types of asset may be restrained by the High Court order.

A **Plaintiff's Evidence Of An Arguable Case**

[16] Exhibit GV2 of plaintiff's 1st affidavit affirmed by Ganapathi Varathan a/l Varathan on 11 September 2007 are letters written by the plaintiff to the defendant complaining about late payments. The plaintiff deposed in paragraph of its 1st affidavit that the defendant's frequent failure to make timely progress payments to the plaintiff during the course of the project had resulted in hardship to the plaintiff. In one of the letters, which dated 18 December 2003 in exh. GV2, it can be seen that for the completed work worth RM4,048,424.90, the defendant had only paid the plaintiff the sum of RM916,206.34. In another letter dated 8 June 2004, it can be seen that out of RM3,445,450.28, certified by the defendant as the value of the work completed by the plaintiff, the defendant had only paid the plaintiff the sum of RM2,603,590.33; thus leaving a shortfall of RM1,085,671.45. It also can be seen from the correspondences that the plaintiff had alerted the defendant that unless the payment due to the plaintiff under the contract is paid on time, the plaintiff would not be able to complete the work according to the time frame agreed earlier between the parties. The plaintiff also had given the defendant the calculation for additional costs of the delay in the completion of the works by the plaintiff due to the defendant's failure to pay the plaintiff on time.

[17] Another letter by the plaintiff dated 30 June 2004 in exh. GV2 reminded the defendant of the latter's promise to make prompt payment of the sum due to the plaintiff and also indicating to the defendant that if payment is not made promptly, the work would not be able to be completed. In the same letter the plaintiff urged the defendant to urgently forward the payment to the plaintiff so that the latter can complete the work.

[18] In its letter dated 29 November 2004 to the defendant (exh. GV3 in plaintiff's 1st affidavit) the plaintiff complained to the defendant of the various obstructions to the project that hindered its speedy completion by the plaintiff. In particular, the plaintiff lamented the defendant's actions of giving oral instructions on variation works on numerous occasions but then refusing to issue official change order instructions.

[19] These evidences and other documented evidence as to the late payment to the plaintiff and the issuance of the variation works order exhibited as exhibits in the plaintiff's 1st affidavit

clearly shows that there is a serious dispute on numerous issues regarding the contract between the plaintiff and the defendant. I am satisfied to that fact.

[20] As to the defendant's assets within the jurisdiction of the court, the plaintiff has exhibited a Bumiputra Commerce cheque dated 19 October 2004 for the sum of RM44,788 purportedly issued by the defendant to one Hap Yong Construction Sdn Bhd (exh. GV29 in plaintiff's 1st affidavit) drawn on the Bank Bumiputra Commerce Bhd. Thus, the plaintiff contends that this is evidence of the defendant having an account with the bank.

[21] The plaintiff also conducted a land search at Land Office and the search revealed that the defendant is a the sole registered proprietor to at least four pieces of land which print-out titles are exhibited as exh. GV29 in the plaintiff's supplementary affidavit affirmed by Ganapathi Varathan a/l Varathan on 28 September 2007. Two pieces of the land are situated in Kemena Land District and the other two are in Bintulu Town District. It is therefore not in dispute that all the 4 pieces of land registered in the name of the defendant are all within the jurisdiction of this court.

[22] On the issue of dissipation of assets, counsel for the plaintiff submits that the law is settled that risk of dissipation of assets is inferable from the conduct of the defendant and that the courts have accepted *prima facie* evidence of dishonesty as showing real risk of assets will be dissipated. There are a number of authorities to support this proposition, and these authorities are cited by the plaintiff's counsel.

[23] In *Ang Chee Huat v. Thomas Joseph Engelbach* [1995] 2 CLJ 893, the Court of Appeal had decided that the conduct of the defendant has to be looked at when considering the question as to whether there is a real risk of dissipation of assets. In that case it was decided that if the conduct of the defendant is lacking in probity and honesty upon considering the evidence, then there is a real risk that the assets of the defendant will dissipate should the plaintiff succeed at the trial.

[24] In another case from Singapore, the Court of Appeal there also accepted the principle that there is co-relation between objective evidence of *prima facie* dishonest conduct and the real risk of asset dissipation: *Amixco Asia Pte Ltd v. Bank Negara Indonesia* [1992] 1 SLR 703.

[25] *Petowa Jaya Sdn Bhd v. Binaan Nasional Sdn Bhd* [1988] 2 MLJ 261 is also a case for Mareva injunction; and one of the issues that the court had to consider in that case is the probity of the defendant. This issue was in respect of the defendant's conduct in detaining 98% of the progress payment Nos. 22 and 23 due to the plaintiff and the use of the plaintiff's equipments without the plaintiff's consent. The subject matter of the Mareva injunction in that case is the retention sum under the contract between the plaintiff and the defendant. As to this issue, this is what the court said at p. 264:

> The undisputed detention and use of the plaintiff's equipment, without the consent of the plaintiff, and above all, the undisputed detention of 98% of progress payments Nos. 22 and 23, without paying the same to the plaintiff, would indicate that the probity of the defendant could not be relied on with regard to the agreed retention sum with which the Mareva injunction was concerned in other words, the defendant would, far more probable than not, dissipate the agreed retention sum in question without paying it to the plaintiff, or dealing with it not for the purpose that was intended. The risk of dissipation was not just a mere possibility, but almost a certainty.

[26] As to the defendant's lack of probity, the plaintiff relies heavily on the purported conspiracy between the defendant and the main contractor to have the plaintiff's contract terminated. In its affidavit, the plaintiff deposed that on 25 May 2005 Javel Engineering Sdn Bhd, the employer, purportedly issued a notice to terminate the defendant's employment under the main contract. The termination was premised on the defendant's alleged lack of diligence and the employer's lack of confidence that the defendant could complete the entire work by 30 April 2005 as evident in exh. GV10. Then on 14 March 2005 the defendant informed the plaintiff and the other sub-sub contractors (Goodwood Transportation Enterprise included) appointed by the defendant of the employer's notice of termination of the main contract. In reply, the plaintiff immediately wrote a letter, as in exh. GV15, to both Javel Engineering Sdn Bhd and the defendant stating that the termination was bad in law and that there were claims for outstanding balance of monies due for works done by the plaintiff and also claims for the loss and expense that was outstanding. The response by Javel Engineering Sdn Bhd to this letter was that it informed the plaintiff through a letter dated 24 March 2005 as in exh. GV17 that it had no contractual relationship with the plaintiff. However on the same day, Javel Engineering Sdn Bhd

also wrote to Goodwood Transportation Enterprise to appoint the latter as the new sub-sub contractor in place of the plaintiff and instructing Goodwood Transportation Enterprise to carry out and complete the remainder of the plaintiff's works. This act by Javel Engineering Sdn Bhd is evident in exh. GV18. Then on 10 and 11 August 2007 the plaintiff discovered that Goodwood Transportation Enterprise has filed a winding up petition against the defendant on 20 September 2006. Based on the affidavit's evidence filed in the winding up petition, in exhs. GV20 and GV25, it revealed that the defendant was never terminated by the employer, Javel Engineering Sdn Bhd. Even after the purported termination of the defendant by Javel Engineering Sdn Bhd, the defendant's representatives affirmed that the defendant is in charge of the Infra Works at the project. This can be seen from exh. GV20. There is also a letter written by Javel Engineering Sdn Bhd to Goodwood Transportation Enterprise dated 17 November 2006 (exh. GV21) in which reference was made to the defendant's continued role as Javel Engineering Sdn Bhd subcontractor.

[27] The evidence of the defendant informing the plaintiff and the other sub-subcontractors about the termination of the defendant's contract with Javel Engineering Sdn Bhd is found in a letter exh. GV14. The relevant part of the letter reads:

> Javel Engineering Sdn Bhd has terminated our Contract for the above project effective as of 22nd March 2005.
>
> Thus, KACC Construction Sdn Bhd will cease operation at the above site as of 22nd March 2005.
>
> In view of the above circumstances,
>
> 1. you are to cease operation on the above site immediately and demobilize your direct labour crews from the site …
>
> …
>
> 6. Javel Engineering Sdn Bhd will take over from KACC Sdn Bhd the following subcontractors… .

[28] In another letter (exh. GV16) dated 23 March 2005 to the defendant, Javel Engineering Sdn Bhd instructed the defendant to resolve all contractual matters relating to the latter's lower tier subcontractors and to do so within one week from that date. In the same letter Javel Engineering Sdn Bhd also stressed that after 23 March 2005 it will not allow parties privy to the main contract to be at the site.

[29] However on the evidence, it has been shown that the defendant despite being terminated continued to work for Javel Engineering Sdn Bhd, the employer, and had in fact appointed a new company namely Goodwood Transportation Enterprise to continue and complete the works that were contracted to the plaintiff. This fact is not denied or challenged by the defendant. The only explanation by the defendant as to this fact is found at para. 12 of the defendant's 2nd affidavit. In that paragraph the defendant said that Java Engineering Sdn Bhd subsequently to let the defendant finish the infrastructure and ancillary works as these works were ahead of schedule and did not involve the plaintiff. I find this explanation unconvincing. Earlier, I had referred to the termination notice issued by Javel Engineering Sdn Bhd to the defendant notifying the defendant of the termination of the Javel Engineering Sdn Bhd/KACC Construction Sdn Bhd contract in which Javel Engineering Sdn Bhd had instructed the defendant to leave the project site by 23 March 2005 and for the defendant to resolve all outstanding matters with the sub-subcontractors or the 2nd tiers contractors. Thus, I agree with the submissions by the learned counsel for the plaintiff that this explanation is flimsy, embarrassing and smacks of total dishonesty. It is also pertinent to note that the plaintiff has commenced a writ action against Javel Engineering Sdn Bhd and the defendant in Suit No. 22-159-2007-III for tortuous breach of the contract between the defendant and the plaintiff.

[30] In the circumstances, I am of the view that the plaintiff has a good arguable case against the defendant.

[31] As to the risk of dissipation of asset, and thereby the necessity to preserve those assets from being dissipated, one needs to be reminded of the policy and principles underlying a Mareva injunction. In *S & F International Ltd* (*supra*), the Federal Court, after referring to several English cases stated the policy underlying the Mareva injunction as: "the sole purpose of Mareva injunction was to prevent a plaintiff being cheated out of the proceeds of an action, should he be successful, by a defendant transferring his assets abroad or dissipating his assets within the jurisdiction, and that the remedy was not intended to give a plaintiff priority over those assets, or to prevent a defendant from paying his debts as they fell due, or to punish him for his alleged misdeeds, or to enable a plaintiff to exert pressure on him to settle an action". And that "a Mareva injunction was never intended to put a

plaintiff in the position of a secured creditor and every case had to be dealt with on its own merits." In the same case the court also said, at p. 283, that "the jurisdiction to grant Mareva injunction was exercisable in cases where it appeared just and convenient to the court to grant the injunction, and the plaintiff, had *inter alia*, to show on the evidence as a whole, that there was at least a good arguable case that he would succeed at the trial, and that a refusal of an injunction would involve a real risk that a judgment or award in his favour would remain unsatisfied because of the defendant's removal of assets from the jurisdiction or dissipation of assets within the jurisdiction.". The facts of that case are very similar with the present case in that there the respondent also claiming a sum of RM2,025,822.40 from the appellant for works done under a sub-contract. The court in that case found that the claim by the respondent were set out in the pleadings and in fact supported by invoices which are verified and explained in an affidavit of the managing director of the respondent. In that case the court refused to disturb the Mareva injunction granted in the exercise of a discretion by the High Court, on the appeal by the appellant.

[32] Another factor to consider is that a jurisdiction to grant a Mareva injunction is a jurisdiction in equity. If any of the parties that come to court with their hands tainted with their own inequities then the court should not accede to their requests. As was said in *Larut Consolidated Bhd & Anor v. Khoo Ee Bee & Ors* [1997] 5 CLJ 307, 334 that the court cannot be used as an instrument to perpetrate injustice and that in the circumstance it will be a travesty of justice if the court do not consider the question as to where the justice of the case lies.

[33] In his written submissions, learned counsel for the defendant submits that Mareva injunction is a drastic move against the defendant and the plaintiff is making mere allegations which are yet to be proven. He says the interim Mareva injunction *inter alia* froze the defendant's account with CIMB Bank Bhd (Account No. 35-11141-1143058) and restrained the defendant from dealing, encumbering, disposing or diminishing the value of any of its assets and monies to the limit of RM2,404,364.24. He argues that the fact that the defendant was still on site carrying out works after termination does not necessarily mean there was a conspiracy. Referring to paras. 12, 13 & 15 of the defendant's 2nd affidavit affirmed on 26 October 2007, learned counsel submits that the main contractor Javel Engineering Sdn Bhd subsequently

decided to let the defendant finish the infrastructure and ancillary works which were ahead of schedule. He further submits that these works, which later becomes the subject of a dispute between the defendant and Goodwood Transportation Enterprise, did not involve the plaintiff scope of works. He submits that on the evidence in exh. SAH1, the work order exhibited in defendant's 1st affidavit affirmed on 16 October 2007, it shows that the works involving the plaintiff was carried out also by Goodwood Transportation Enterprise by direct contract from the main contractor Javel Engineering Sdn Bhd. He submits that this fact is also acknowledged by the plaintiff because the plaintiff made reference to the work order in exh. GV18 in the plaintiff's 1st affidavit.

[34] Learned counsel also submits that the defendant has denied the claim of conspiracy. Therefore he says, relying on the decision in the Singapore case of *European Grain & Shipping Ltd v. Compania Naviera Euro Asia SA & Ors* [1989] 1 LNS 157, it would be wrong for the court to express any opinion on the conduct of the defendant as if the allegation of conspiracy against the defendant had been proved.

[35] On the issue of dissipation of assets, learned counsel for the defendant submits that there must be a serious risk of dissipation. Bare assertions that the defendant is likely to put the assets beyond the plaintiff's reach or that the defendant is unlikely to honour any judgment or award is not enough: *Tsoi Ping Kwan v. Loh Lai Ngoh & Anor* [1997] 3 CLJ 552.

[36] Referring to the depositions in paras. 19 and 20 of the defendant's 2nd affidavit and exhs. SAH1, SAH3 and SAH4 in the defendant's 1st affidavit, learned counsel submits that the defendant is a local company with substantial assets and that it has been two and a half years since the termination of the contract between the parties; and the plaintiff has not shown that the defendant has dissipated its assets. On the contrary he said, the defendant has just secured a new contract from the Federal Government by a tender award to build a marine Base at Kuching on a joint venture basis. The defendant has taken over the site on 5 September 2007 and the contract duration is until 5 March 2011. This, he says, is evident from exh. SAH2 in the defendant's 2nd affidavit. As also evident in exh. SAH3 in the same affidavit, the defendant's current certificate as a PKK Class A contractor has been extended to 19 November 2009.

[37] Learned counsel for the defendant further submits that the defendant also has landed properties as shown in the defendant's 2nd affidavit. Therefore he argues it is unforeseeable that defendant would dissipate its assets. The value of the defendant's landed assets alone are more than enough to cover the amount of RM2,404,364.24 claimed by the plaintiff. Also he says that at p. 12 of exh. SAH4 in the defendant's 1st affidavit, it is shown that the defendant has a bank balance which indicate a favourable net asset position and that the current assets for financial year 2006 was RM2,206,202. Learned counsel submits that these assets are not assets of an ephemeral nature; but long term assets, especially the landed assets. He submits on the evidence as to the defendant's assets as disclosed in the defendant's 1st affidavit shows that the defendant is very much active in business. He therefore submits that there is no real evidence suggesting that the defendant would take step to dissipate its assets to avoid the payment of any judgment. Learned counsel argues that if the defendant had intended to do so, it would have been done; since the defendant has had ample time to do so from the date of the termination. But until now the defendant has not done so.

[38] Another argument by the learned counsel for the defendant that the defendant has no intention of dissipating its assets, is that the defendant had received a letter from the plaintiff dated 23 March 2005 (exh. GV15 in plaintiff's 1st affidavit) stating that the termination was unreasonable and vexatious and threatened the defendant with legal action to recover the outstanding sums due from the plaintiff and for damages for unlawful termination of the contract. However, learned counsel submits that despite the legal threat, the defendant continued to carry on its business as usual and no evidence had been shown that the defendant attempted to conceal its assets. Relying on *Monatech (M) Sdn Bhd v. Jasa Keramat Sdn Bhd* [2002] 4 CLJ 401, learned counsel submits that the conduct and intention to dissipate assets must go hand in hand. In this case he says there is no evidence of intention; it is only presumed by plaintiff on the allegation of defendant's conduct as to the alleged conspiracy to terminate the contract, a fact which is yet to be proven. He submits that the absence of any evidence of any recent transfer of assets by the defendant despite the legal threat by the plaintiff and the threat of being wind up at the instant of Goodwood Transportation Enterprise clearly shows that the defendant has no intention of dissipating the assets.

[39] The next argument by the defendant that the plaintiff should not be entitled to the grant of the Mareva injunction is because the plaintiff has not been frank and full in its disclosure when making the *ex parte* application for Mareva injunction. He says the plaintiff had not disclosed the true position of the defendant's assets as reflected in the defendant's audited accounts filed with the Registrar of Companies as evident in exh. SAH4 in defendant's 1st affidavit. Learned counsel argues that the plaintiff could easily obtain this information from the Registrar of Companies by conducting a company search on the defendant. Had the plaintiff done that, he says, then the plaintiff would be able to see the audited account of the defendant because it is a matter of public record. Learned counsel of defendant submits that the defendant's audited account filed with the Registrar of Companies as in defendant's exh. SAH4 would show that the defendant's assets are more than sufficient to meet the plaintiff's claim before the arbitrator, if the plaintiff is successful there.

[40] It is the contention of the defendant that the balance of convenience in this case does not lie with the plaintiff. In fact, learned counsel for the defendant submits, the Mareva injunction sought by the plaintiff is oppressive on the defendant. It stifles the defendant from carrying out its legitimate business. Learned counsel ventured that the real reason for the plaintiff's application for Mareva injunction is to obtain security for the claim; that he says is an abuse of the process of a Mareva injunction.

[41] As to the issue of dissipation of assets, the counsel for the defendant has submitted earlier that conduct and intention of the defendant must go hand in hand. There had been some discussions on the authorities on this point in *Pacific Centre Sdn Bhd v. United Engineers (M) Bhd* [1984] 2 CLJ 56; [1984] 2 CLJ (Rep) 319 by the learned Edgar Joseph J (as he then was). Having reviewed the authorities in that case, His Lordship stated that the preferable view is that it would be sufficient for the plaintiff to merely show a risk of disposal of assets which has the effect of frustrating the plaintiff in his attempt to recover the fruits of a judgment he is likely to obtain against the defendant. His Lordship had come to this conclusion because of the *'practical difficulty of proving the requisite intent'*. It is also interesting to note at this juncture that in the same case His Lordship has sought the support of a dictum in the judgment of Raja Azlan Shah CJ (Malaya), as His Majesty then was, in *Zainal Abidin bin Haji Abdul*

Rahman v. Century Hotel Sdn Bhd [1982] 1 LNS 34, which expressed the opinion that the appellant's fear of the proceed of sale disappearing in that case does not come within the concept of disposing of assets with the intention or effect of defeating a claim. I agreed with the learned judge view in *Pacific Centre Sdn. Bhd.*'s case (*supra*).

[42] It would appear in this instant case that the lack of probity on the part of defendant in relation to the termination of the main contract with Javel Engineering Sdn Bhd and hence subsequently the termination of the sub-subcontractors' contracts by the defendant has strong vibes. I say so because it is evident from exh. GV16 that the main contractor Javel Engineering Sdn Bhd had told the defendant and all the subcontractors under the defendant to clear the project site by a certain date. Yet after that date the defendant and a certain sub-contractor continued to remain on the project site to complete the works left behind by the plaintiff following the termination, purportedly at the request of the main contractor.

[43] However, lacking in probity, though a strong factor to be considered as to whether or not to grant Mareva injunction, must be seen, in my opinion, in the light of the other circumstances of the case. It is not absolute factor or decider to the grant of Mareva injunction. The equation in this case that because the defendant and the main contractor were purportedly not being honest in their contractual relationship with regard to the plaintiff, therefore the defendant would also likely be not reliable in the plaintiff's expectation to meet the judgment which the plaintiff is likely to obtain in the arbitration proceedings simply does not square. The defendant has, I think, amply demonstrated that it had not taken any steps to put its assets out of reach of the plaintiff. In fact I would say that the defendant has been frank in disclosing all its assets within jurisdiction in its 1st affidavit.

[44] It is true that the plaintiff has shown that the defendant is not exactly a good paymaster. There is evidence in the affidavits, and the defendant did not deny this, that the defendant has been slowed in making payment to the plaintiff for works already done and billed to the defendant. This fact however is insufficient to grant the plaintiff the Mareva injunction on the reasoning that if the plaintiff is successful in the arbitration proceedings the plaintiff

would also be at difficulty to realize the judgment in the same manner as it is difficult to get payment from the defendant under the contract. If that is the reasoning to be followed then I think the granting of the Mareva injunction would merely put the plaintiff in the position of a secured creditor, something which is not supposed to be done in Mareva injunction.

[45] I have also given consideration to the fact that the defendant is a company having an on-going business. Though there is a winding up petition being filed against it, the outcome of that petition is yet to be decided; the defendant has not yet been wound up. Looking at the defendant's assets as disclosed to this court, I do not think that the defendant should be hindered in its effort to resolve the threat of being wound up by the granting of the Mareva injunction. I think to grant such injunction would be oppressive on the defendant.

[46] In the circumstances, I would discharge the interim Mareva injunction given earlier. Costs of this *inter partes* hearing is given to the defendant. Notwithstanding this ruling, the plaintiff may file for a fresh Mareva injunction if the plaintiff can show the change in circumstances on the part of the defendant that would support an argument that the defendant is taking steps to dissipate the assets after the date of this order.